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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 87

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, PETITIONER,

vs.

LULA CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

MORISON R. WAITE,
HARRY R. McMULLEN,
CASSIUS W. McMULLEN,
WILLIAM A. EGGERS,
Counsel for Petitioner.

(34,203)

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, the Baltimore and Ohio Southwestern Railroad Company, respectfully shows as follows:

Statement of Questions Involved.

Review and reversal is sought by this petition of the judgment of the Supreme Court of the State of Indiana

of October 2, 1928 (R. 276)—petition for rehearing denied March 15, 1929 (R. 287)—affirming that of the Circuit Court of Jackson County, Indiana, which awarded damages to an administratrix for the wrongful death of her decedent under the Federal Employers' Liability Act, approved April 22, 1908, 35 Stat. 65 C. 149, U. S. C. Title 45, Ch. 2, as amended April 5, 1910, 36 Stat. 291 C. 143, no complaint or petition seeking recovery for damages because of such wrongful death having been filed until more than three (3) years after the death of said Burtch (R. 34). The complaint claiming such damages was an amended complaint filed by the administratrix in the action originally brought by her decedent in his lifetime, and in which he recovered judgment, which judgment was before this Court and reversed by it in Baltimore and Ohio Southwestern Railroad Co. *vs.* Burtch, 263 U. S. 540 (R. 34). The administratrix had herself made party to the proceedings in this Court (R. 208) and endeavored to have the judgment sustained. The question is whether an administratrix of a decedent, who more than two years after the death of her intestate has had herself made party in a proceeding to reverse a judgment for personal injuries in favor of her decedent, and has endeavored to sustain that judgment, can, after its reversal, file an amended complaint more than three years after his death, and claim therein and recover thereon both damages sustained by the decedent in his lifetime and damages for the next of kin because of the wrongful death, no claim for damages for wrongful death having theretofore been asserted, and no

action therefor filed within the two-year period within which alone the statute permits an action to be brought.

There is also a further question involving assumption of risk by the decedent. The accident was due to a knot in a plank procured by Burtch and another, for use as skids in unloading a shipment, which knot was visible on the edge of the plank, but not on either the top or bottom (R. 155). Charges were given on the request of your petitioner, that if the dangers or risks were so apparent that Burtch in the use of ordinary care ought to observe and know of, and with such means of knowledge continues in his work, he is not entitled to recover; also that if he had equal means with the defendant of observing the defect, he could not recover (Charges 16 and 17, R. 85-86). A conflicting charge, requested by the respondent, was given, that Burtch did not assume the risk unless he knew and appreciated the hazards and dangers to which he was about to be exposed, and with full knowledge thereof voluntarily encountered the same, when a person of ordinary prudence would not have done so (Charge 8½, R. 93).

Historical Statement.

On October 24, 1917, Guerney O. Burtch was injured while helping to unload a shipment from a car on the line of your petitioner at the station at Commiskey, Indiana (R. 210-211).

He filed a complaint in the Circuit Court for Jackson County, Indiana, on February 20, 1918, on account of the injuries he sustained (R. 1).

There was a verdict and a judgment May 28, 1918, for eight thousand dollars ($8,000) (R. 14). Thereafter, and while the case was pending in the Supreme Court of Indiana, Burtch died, to wit, on February 10, 1921 (R. 102). His widow, Lula Burtch, was, on February 14th, 1921, appointed as administratrix (R. 103).

The judgment of the Jackson County Circuit Court was affirmed by the Supreme Court of Indiana March 14, 1922 (R. 33).

A petition for certiorari filed in this Court from that judgment on September 2, 1922 (R. 207), was allowed in this Court, and certiorari and return filed herein January 2, 1923 (R. 208). On her own motion, the administratrix was substituted as respondent in said proceedings February 20th, 1923 (R. 208).

The said judgment of the Supreme Court of Indiana was reversed by this Court January 7th, 1924 (R. 34). The opinion is reported in Baltimore and Ohio Southwestern Railroad Co. *vs.* Burtch, 263 U. S. 540.

Two points were determined by this Court: one that the shipment involved was an interstate shipment, and the other that Burtch was an employee of the railroad company at the time of the accident engaged in interstate commerce, and that, therefore, the case was controlled by the Federal Employers' Liability Act.

The Supreme Court of Indiana thereupon reversed the Circuit Court of Jackson County, Baltimore and Ohio S. W. R. R. Co. *vs.* Burtch, 192 Indiana 199 (R. 34).

Thereafter, to wit, on March 5, 1924, a so-called amended complaint was filed by Lula Carroll as ad-

ministratrix of the estate of Guerney O. Burtch, deceased, against your petitioner in the Circuit Court for Jackson County, Indiana (R. 34), Mrs. Burtch in the meantime having been married and being now Lula Carroll (R. 226). This complaint of March 5, 1924, contained three paragraphs as follows:

(*a*) A paragraph purporting to state a cause of action under the State Employers' Liability Act (R. 34).

(*b*) A paragraph claiming damages to the deceased during his lifetime and to the plaintiff because of injuries sustained by Burtch during his lifetime (R. 38).

(*c*) A paragraph claiming damages to the deceased during his lifetime because of his injuries and to the plaintiff because of the death of Burtch alleged to have resulted from the injuries. This last paragraph alone was under favor of the Federal Employers' Liability Act (R. 41).

There was a verdict and a judgment on the trial of this case March 19, 1925 (R. 102).

This judgment was affirmed by the Supreme Court of Indiana October 2, 1928 (R. 276), the opinion being reported — Indiana, —; 163 Northeastern Reporter 99. A petition for rehearing was duly filed and overruled by the Supreme Court of Indiana March 15, 1929 (R. 287), 163 Northeastern Reporter 99.

This was the final action available to your petitioner in the state court.(*)

(*) Section 730, Burns' 1926 Indiana Statutes, reads:

"When any cause is determined in the Supreme Court, the clerk shall forthwith notify the clerk of the court below that it is deter-

There was a stay ordered conditioned upon application for Writ of Certiorari being made on or before May 13, 1929 (R. 289) and bond furnished (R. 289).

Statement of the Facts.

The essential circumstances are pointed out in the opinion of this court of January 7, 1924, 263 U. S. 540. As a matter of convenience, it may be stated here that the shipment involved originated at Louisville, Ky., and was destined to Commiskey, Indiana (R. 141-142). It consisted of an ensilage cutter that weighed about two thousand (2,000) pounds (R. 217). Although it was ordered through a local dealer at Commiskey from a wholesale house at Indianapolis (R. 199), the plaintiff and other farmers who were the owners of the machine were on hand at the station at Commiskey awaiting the arrival of the machine, and were prepared to receive it (R. 197). The crew of the local freight train handling the shipment found that it was too heavy for them to unload it. They also found that the ordinary pair of skids such as is customarily used in handling a barrel were inadequate (R. 212).

The conductor called upon the bystanders to assist in the unloading of the shipment. He requested them to get a couple of timbers. Burtch and another procured these timbers from an adjoining saw mill (R. 212). They were not the property of the railroad.

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mined, and whether reversed or affirmed, in whole or in part, or dismissed. At any time within sixty days after such determination, either party may file a petition for a rehearing; if not so filed, the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court."

They placed them against the side of the car and one broke from the weight of the shipment (R. 213). After the accident it was found that one of them had a knot in it, where the break occurred, that did not show on the top or bottom of the plank, but did show on the edge (R. 155). When the cutter rested halfway down on the skids the timber with the knot broke, precipitating the machine onto Burtch (R. 213). All concerned had equal means of determining the suitability of these timbers for use as skids. There is no testimony of any examination of them made by anyone, except in the testimony of the decedent Burtch (R. 212-213):

> "Granville Arbuckle and I went after these plank. We got two pieces 10 or 12 feet long and 3½ x 5 inches thick. We took them to car and put one end in the car and the other across the stub switch. Jackson looked at them and kind of tested them and worked his foot up and down to see and said they would hold. Everett Arbuckle wanted or did put one end of a barrel skid under there and wanted some one to take the other end and put it on edge to support the plank but they said no, that they did not need it."

The Statutes Involved.

The basic statute, of course, is that commonly known as Federal Employers' Liability Act, giving a right of action to employees of common carriers by railroad injured, or their personal representatives if killed, while in interstate commerce through the negligence of the railroad. Following the original act of April 22, 1908, U. S. C., Title 45, Ch. 2, Sec. 51, came the

amendment of April 5, 1910, U. S. C., Title 45, Ch. 2, Sec. 59, providing that the action for personal injury should survive to the personal representative of the employee for the benefit of persons there designated, they being the same beneficiaries as those named in the original act in whose behalf a suit for death might be brought. The amendment, however, stipulated, "but in such cases there shall be only one recovery for the same injury."

It was also provided in the original act of 1908 that "no action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued" (U. S. C., Title 45, Ch. 2, Sec. 56).

Bearing these statutes in mind, we think it advisable to refer briefly to some of the important dates in the history of this case.

The accident occurred October 24, 1917, and Burtch, the employee, died February 10, 1921, more than three years after the date of the accident. His widow was appointed administratrix February 14, 1921, and more than two years after her appointment was substituted as respondent in the proceedings in this Court February 20, 1923, on motion made by her counsel (43 Sup. Ct. Rep. 360). This Court reversed the Supreme Court of Indiana on January 7, 1924. The amended complaint, when the administratrix first claimed damages for wrongful death, was filed March 5, 1924, more than three years after the death of Burtch and her appointment as administratrix, and more than six years after the date of the accident.

The Jurisdiction of This Court.

We submit that this is a cause of which this Court may properly take jurisdiction by its writ of certiorari.

(*a*) The errors complained of are not technical, and involve defects that affect the substantial rights of the petitioner under a statute of the United States, which right was decided adversely to your petitioner by the highest court of the State of Indiana (U. S. C., Title 28, sec. 344).

(*b*) Under Section 730, Burns' 1926 Indiana Statutes, quoted above, the railroad after the judgment was affirmed by the Supreme Court had the right to petition for a rehearing. This was done. It was the last available step open in the state court. The petition for rehearing was denied March 15, 1929, and this petition is filed within three months from that date (U. S. C., Title 28, section 350; Chicago, G. W. R. R. Co. *vs.* Basham, 249 U. S. 164, 167) and within the period fixed in the supersedeas bond, May 13, 1929 (R. 439).

(*c*) By the opinion of this Court, when this case was before it on a prior occasion, it was established that the Federal Employers' Liability Act controls (The Baltimore and Ohio Southwestern Railroad Company *vs.* Lula Burtch, administratrix, 263 U. S. 540).

(*d*) Your petitioner seasonably raised in the courts below the Federal questions involved.

1. A motion to separately state and number the several causes of action united in each paragraph of the amended complaint (R. 44), which was overruled (R. 44).

2. Motions were made to strike out all those parts of the amended complaint relating to the death of Burtch, and to damages on account of said death (R. 45 and 59), which were overruled (R. 49).

3. There was a demurrer to the amended complaint, which in several ways raised the question of the limitation period (R. 52; R. 53, sub. 3, paragraph *g* and sub. 4; R. 54, sub. 15; R. 54, sub. 16). This demurrer also in several ways raised the question of assumption of risk (R. 53, sub. 3, paragraph *e-e*, and sub. 5; R. 53-54, sub. 7 and 11; R. 54-55, sub. 18).

4. In the answer, both in the second and third paragraphs, the railroad set up that the death claim was barred by the statute of limitations (R. 56-57) and assumption of risk (R. 57).

5. A motion to strike all reference to the death was overruled (R. 59-60).

6. Instructions Numbers 7 (R. 92), 8 (R. 93), 10 (R. 94), 13 (R. 94), and 14 (R. 95), offered by the plaintiff and given, over objection (R. 96), raise the question of limitations under the Federal law. The effect of these was to permit the jury to consider the evidence under the third paragraph of the complaint as to the damages for death notwithstanding the fact

that the amended complaint was filed more than two years after Burtch had died.

7. Instruction 8½ (R. 93) requested and given by the court at the plaintiff's request, over objection (R. 95), instructed the jury that there could be no assumption of risk unless the decedent had actual knowledge and appreciation of the hazards and dangers to which he was about to be exposed, which was in conflict with charges given at defendant's request, 16 and 17 (R. 85-86), that decedent was chargeable with knowledge if he had equal means with defendant of observing the defect, or if in the use of ordinary care he ought to have observed it.

8. In the motion for a new trial the question of limitations was again pressed (R. 116 and 118).

9. The question of limitation was again raised when objection was made and overruled to the reading of the transcript of the proceedings in the first suit (R. 205).

10. The limitation question was again raised during the examination of the administratrix (R. 228, 229, 231, 232).

(*e*) Moreover, the case involves a question of general importance under the Federal Employers' Liability Act and is one of first impression. At least our researches have not brought to light any decisions that we deem squarely in point.

The Errors Complained of.

The errors of the trial court consisted in the overruling the several motions and demurrer and in giving the special charges above referred to, all of which raise the questions stated at the outset of this petition.

Under the decision of this Court and the findings of the jury resulting in the verdict and judgment now complained of, the only applicable paragraph of the amended complaint was the third, as it alone averred interstate commerce (R. 41). It combined in one paragraph a claim for damages for the injury suffered by the decedent in his lifetime and a claim for damages sustained by the widow and next of kin due to death. These were two separate causes of action. The primary rights of Burtch because of the injury, and of his next of kin, as represented by the administratrix, because of death were different and the violations of those rights created, therefore, two distinct causes of action. The motion to separately state and number should have been granted.

The amended complaint, filed March 5, 1924, showed the date of death February 10, 1921 (R. 37, 40, 43), and consequently showed that the cause of action because of the death was barred by the two years' limitation in the act, so that the motions to strike out the allegations respecting death and damages because of death should have been granted, and the charges permitting recovery of damages because of death should not have been given. Then there is also the error resulting from the instructions as to assumption of risk, to which we have just referred.

These errors of the trial court were affirmed by the State Supreme Court notwithstanding the insistence of the petitioner herein, plaintiff in error therein, to the contrary.

Prayer.

Your petitioner presents herewith as a part of this petition a certified copy of the transcript of the record in the State court, and will present its brief for consideration with this petition, discussing at greater length the questions involved.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of proceedings in said Supreme Court in the case entitled The Baltimore and Ohio Southwestern Railroad Company *vs.* Lula Carroll, Administratrix, and numbered in said Supreme Court No. 25346, to the end that this case may be reviewed and determined, as provided in the acts of Congress in such case made and provided, and that the petitioner may have such relief as this Court may deem proper, and that the opinion and judgment of said Supreme Court of the State of Indiana may be reversed by this Honorable Court.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
By MORISON R. WAITE, AND
WILLIAM A. EGGERS,
Its Counsel.

STATE OF OHIO,
County of Hampton, ss:

William A. Eggers, being duly sworn, on his oath says that he is one of the counsel for the Baltimore and Ohio Southwestern Railroad Company, petitioner herein; that the foregoing petition was prepared under his instruction and under his supervision, and that he has carefully read the same and believes the allegations herein are true.

WILLIAM A. EGGERS.

Subscribed and sworn to before me this 11th day of May, A. D. 1929.

[SEAL.] PAUL DEWALD,
Notary Public in and for Hamilton County, State of Ohio.

My commission expires March 27, 1930.